

Supreme Court, U. S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-521

NATHAN S. SMITH,
Petitioner,

v.

ARTHUR R. GRIMM and JEANNINE GRIMM,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

EUGENE GRESSMAN
1828 L Street, N.W.
Washington, D. C. 20036

STEVEN M. KIPPERMAN
407 Sansome Street
San Francisco,
California 94111

Counsel for Petitioner

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The main reason why certiorari should be granted is to determine the impact of *Houston v. Ormes*, 252 U.S. 469 (1920), on the jurisdictional factors resolved here by the Ninth Circuit. Although that decision was thoroughly briefed before the Ninth Circuit, the court did not see fit to recognize or distinguish the *Houston* case—perhaps because the court could not distinguish it.

The important fact remains that the *Houston* decision appears to contradict the Ninth Circuit's ruling on all jurisdictional points, i.e., *Houston* arguably indicates that there is a federal question in this case, that there is a basis for asserting mandamus against a federal officer, and that sovereign immunity is not available as a defense. The respondents' Opposition (p. 3) attempts to distinguish *Houston* on the ground that it was bottomed on a specific appropriation by Congress, whereas the respondent Grimm "was and will be paid out of the general appropriations for the Defense Department."¹ And the respondents add (Opp. p.5) that the appropriations for military pay and allowances are "strictly regulated by a scheme of federal statutes and implementing regulations," which purportedly do not permit recognition of an attorney's equitable lien.²

¹ Respondents' attempted distinction of the *Houston* case on this ground is belied by the Solicitor General's brief (p. 7) in that case, which pointed out that the appropriation in *Houston* was "made payable 'out of any money in the Treasury not otherwise appropriated' [and] segregates no special funds of the Government." This Court accepted that description of the *Houston* appropriation, which thus becomes markedly similar to the general appropriations involved in the instant case.

² In support of that contention, the respondents (Opp., p. 5) point to 37 U.S.C. § 1007, listing deductions that can be made from the pay of members of the armed forces—which does not specifically mention deductions inspired by equitable liens. But § 1007 must be read in conjunction with Part 6 of the Defense Department Pay Manual, which authorizes military service men to allocate their pay to "banking institutions for credit to the account of another." Also relevant is 37 U.S.C. § 701(a), which contemplates that, pursuant to regulations, a commissioned officer of the Air Force "may transfer or assign his pay account, when due and payable." Thus the original decision by the District Court below, enforcing the equitable lien, is entirely consistent with the "scheme of federal statutes and implementing regulations." Opp. p. 5.

But these arguments, quite apart from their intrinsic inadequacies, serve mainly to emphasize the federal nature of this case and to add certiorari fuel to the controversy over the present-day vitality and meaning of the *Houston* principles. Is *Houston* totally different from this case? Should the *Houston* ruling be ignored when federal question jurisdiction and federal officer mandamus jurisdiction are invoked to enforce an attorney's equitable lien against a federal fund held by federal officers? Should the doctrine of sovereign immunity be gratuitously raised in circumstances where *Houston* said it was inapplicable?

The only other thesis in the Opposition (p. 2) is that federal jurisdiction need not be used here since "a state court can do anything a federal court could do in the instant case." That assertion is patently unsound, for a state court could never do what the federal district court tried to do in this case—give petitioner a judgment binding on the Air Force and a declaration that the federal funds in question are subject to the valid equitable lien. A state court can only give petitioner the rather limited protection of an *in personam* judgment against the Grimms.

But the adequacy or inadequacy of the state court remedies has no bearing on the propriety of invoking federal jurisdiction in this case. If there is federal jurisdiction, petitioner is entitled to invoke it. The unanswered question is whether the *Houston* decision commands the federal courts to take jurisdiction over "a simple contract dispute between Smith and Grimm" that is inescapably entwined with federal factors.

CONCLUSION

Respondents' Opposition has in no way diluted the appropriateness of granting certiorari. The basic question finds no answer in federal jurisprudence. Do the principles established in 1920 in *Houston v. Ormes* apply as well in 1976? This Court has never confronted that question. Because of the involvement of the United States in the District Court proceedings below, this Court may wish to consider inviting the views of the United States on this important question.

Respectfully submitted,

EUGENE GRESSMAN
1828 L Street, N.W.
Washington, D. C. 20036

STEVEN M. KIPPERMAN
407 Sansome Street
San Francisco,
California 94111
Counsel for Petitioner